

file

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Application of)
Martin G. Reinke for Water Quality) Case No. 3-NC-95-1049
Certification to Fill Wetland in the)
City of Merrill, Lincoln County)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
APPROVING WATER QUALITY CERTIFICATION

Pursuant to due notice, including a second publication, hearing was held on January 29, 1996, at Merrill, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with sections 227.47 and 227.53(1)(c), Stats , the PARTIES to this proceeding are certified as follows:

Martin G. and Glorian G. Reinke, Co-Applicants, by

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Gerrard Realty Corporation, Co-Applicant, by

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FINDINGS OF FACT

1 Martin G. and Glorian G. Reinke were owners of real property with a legal description of the SW 1/4, NE 1/4 of Section 13, Township 31 North, Range 6 East, Lincoln County, Wisconsin. The above described property is located on the east side of Center Avenue in the City of Merrill, Wisconsin. This property has subsequently been sold to the Gerrard Realty Corporation, 420 South 5th Street, P. O. Box 1086, LaCrosse, Wisconsin, 54602-1086. The parties stipulated that the Reinkes and that the Gerrard Realty Corporation were co-applicants for purposes of this proceeding. In July of 1995, the Reinkes filed a joint State/Federal application seeking a permit to fill .27 acres of isolated wetland basin located in the south central portion of the above-described lot. The co-applicants intend to construct two separate eighteen unit apartment buildings on the above-described property in large part to provide lower cost housing to residents of Merrill and to qualify for affordable housing tax credits. The Army Corps of Engineers granted a permit under sec. 404 of the Federal Clean Water Act. The instant contested case hearing relates to the Wisconsin Department of Natural Resources' review of Water Quality Standards for Wetlands pursuant to NR 103 and NR 299, Wis. Admin. Code.

2 There is no question that a small portion of this property is wetlands within the meaning of Wisconsin law. There is a shallow pond in the area during much of the year. The proposed area of fill is .27 acres of what is likely man-made artificially-created wetlands resulting from construction of a Boy Scout amphitheater sometime around 1970. The boy scouts used the area for some three years. The area was then largely abandoned, resulting in a ponded depression area. The site is isolated and not directly connected with any navigable waterway system. The vegetation located in the area is consistent with wetland vegetation. The plants include trembling aspen, willow and white birch, white pine, goldenrod, pin cherry, various sedge and grasses. Hydrophytic soils are present in the proposed fill area. Hydrology in the area is consistent with there being water located at or near the surface during a significant portion of the year. There is no dispute that the area to be filled is wetlands within the meaning of Wisconsin law.

3 The Department of Natural Resources was convinced on the basis of the application that there were no practical alternatives to the proposal which would not adversely impact wetlands and which would not result in other significant adverse environmental consequences. The applicants submitted the testimony of Mr. Colin Ray and the alternative site analysis contained in Exhibit 7. This analysis indicated that there were other available properties in the area but none of these matched the project purpose of constructing two eighteen unit apartment buildings. Affordable housing units are subject to a rental affordability test that relates to median county income. Ray stated that to make the project economically viable in Merrill and to qualify for affordable housing tax credits, the developers needed a larger number of units than could be had without filling the small area of wetland. The objectors presented no evidence to dispute the conclusion of the Department of Natural Resources that there are no available practicable alternatives to the present site given these economic constraints. Accordingly, a preponderance of the credible evidence supports such a finding.

4. Mitch Zmuda, DNR Area Water Management Specialist and William S. Meier, Wildlife Biologist, conducted a site assessment for evaluating wetland functional values in the area. Zmuda concluded that the subject property represented very low value wetlands overall. Specifically, Meier rated the area as having a low significance for the wetland values of flow diversity, wildlife habitat and water quality protection. Meier further indicated that there was no fishery habitat nor shoreline protection in the area given that there is no nearby navigable waterway proximate to the subject property. Meier rated the flood and storm water attenuation and the groundwater protection and aesthetic recreational and educational values as having medium significance on a scale of low, medium, high and exceptional. However, the great weight of the evidence at hearing was that the subject property was a very small, isolated and highly disturbed area which did not have a significant role to play in the natural environment of the area. The great weight of the evidence was that the project proponent has shown that the proposed fill of .27 acres will not result in significant adverse impacts to the functional values of the affected wetlands, nor significant adverse impacts to water quality, nor other significant adverse environmental consequences.

5. The principal objectors at the hearing stated that their objections were largely if not totally related to the Army Corps of Engineers required mitigation plan which would involve the restoration of a pond and wetland area near the proposed project site. DNR Area Water Management Specialist Mitch Zmuda testified that mitigation is not a part of the Department's NR 103 review process for water quality certification. It is clear that mitigation is not a proper part of the state regulatory standards for water quality certification even though it might be required in a related Army Corps of Engineers permit. The Administrative Law Judge ruled at hearing that these issues were outside the scope of his jurisdiction in the context of the Water Quality Certification Review. Accordingly, most of the case of the objectors relating to their concerns about establishment of the new wetland area was not considered in reaching the decision to grant Wisconsin water quality certification.

6. Zmuda testified that he would like to see two new conditions made a part of the Water Quality Certification. First, the applicant should submit a plan acceptable to the Department for a downspout catch basin which would capture roofing granules that drain directly into wetland areas. Second, the plans set forth in hearing Exhibit 5 prepared by Carlson Engineering are acceptable to the Department relating to surface water runoff from the parking lots draining into sediment settling basins and then passing out into the stormwater system. To clarify any dispute on this point, Zmuda recommended that these plans be incorporated into the Order. The ALJ has considered Zmuda's recommendations and included the two conditions in the amended order for Water Quality Certification which follows.

7. The parties stipulated that the proposed project area is not an area of special natural resource interest within the meaning of sec. NR 103.04, Wis. Admin. Code.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to Water Quality Certification pursuant to sec. 227 43(1)(b), Stats., and NR 103 and NR 299.05(6), Wis Admin. Code.

2. The proposed project will not result in violations of the standards contained in NR 103.08(3), Wis Admin. Code in that no practical alternatives to the proposed project which will not adversely affect wetlands exists nor will the proposed project result in significant adverse impact to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences. The project proponent has shown that the requirements of Chapter NR 103 will be met within the meaning of sec. NR 103.08(4)(b), Wis Admin. Code.

3. The subject property is not located within an area of special natural resource interest within the meaning of NR 103.04, Wis. Admin. Code.

4. The Department has authority pursuant to sec. NR 299 05, Wis. Admin. Code to approve water quality certification if it determines that there is reasonable assurance that the project will comply with the standards enumerated in NR 299.04, Wis. Admin. Code. This project so complies.

ORDER

WHEREFORE IT IS HEREBY ORDERED in accordance with the foregoing Findings of Fact and Conclusions of Law that Water Quality Certification be GRANTED subject to the following conditions.

1. That the co-applicants must notify the Wisconsin Department of Natural Resources of their intent to start the project at least five business days prior to the beginning of any discharge.

2. That within five business days after completion of the project the applicant must notify the Department of Natural Resources of completion of the project.

3. That the certification-holder must allow the Wisconsin Department of Natural Resources reasonable entry and access to the project site to inspect the project for compliance with the certification and all other applicable laws.

4. The certification is contingent upon compliance with the terms of the approval by the U.S. Army Corps of Engineers and any other necessary local ordinance requirements.

5. Surface water run-off from the parking areas shall drain into sediment settling basins and water shall pass into the storm water system according to the plans and specifications set forth in hearing Exhibit 5 prepared by Carlson Engineering.

6 The certification-holder shall present a plan acceptable to the Department relating to the installation and maintenance of a catch-basin for the purpose of collecting roofing granules from the downspout that drains into the wetland area.

Dated at Madison, Wisconsin on February 28, 1996.

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By Jeffrey D. Boldt
JEFFREY D BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.